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Supreme Court, U.S.
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No. 96-1622

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

NICHOLAS KNAPP,

Petitioner,

v.

NORTHWESTERN UNIVERSITY, an Illinois not-for-profit corporation, and RICK TAYLOR,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. THE COURT SHOULD GRANT THE PETITION FOR A WRIT OF CERTIORARI BECAUSE THE SEVENTH CIRCUIT'S DECISION ALLOWING FOR THE EXCLUSION OF A DISABLED PERSON WHO IS ABLE TO MEET, WITH OR WITHOUT REASONABLE ACCOMMODATION, ALL OF A PROGRAM'S REQUIREMENTS CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS.

Nicholas Knapp is an "otherwise qualified" disabled person since he is able to meet all of the requirements of Northwestern University's intercollegiate basketball program in spite of his perceived handicap. *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979). At trial, several nationally known cardiologists testified that playing basketball does not create a significant risk of injury for Knapp and why the "Bethesda Conference" guidelines do not apply to him, now almost three years after his cardiac event. The district court agreed and found that Knapp's playing basketball does not place him at substantial risk and entered an injunction in his favor. Pet. App. C - F. The Seventh Circuit has not suggested that the trial court's factual findings were clearly erroneous. *See Wood v. Omaha Sch. Dist.*, 25 F.3d 667 (8th Cir. 1994) (affirming district court on ground that findings concerning risk of harm to others were not clearly erroneous).

Because of the Seventh Circuit's decision, Knapp remains a perpetual observer. Yet, not one decision of any circuit court supports the Seventh Circuit's minority rule that the trial court should not decide whether a disabled

person satisfies the test enunciated in *Southeastern Community College*, but rather is to determine only whether the federal grantee acted in good faith in reaching an incorrect decision about future risk of injury.

The only decision the Seventh Circuit cites to support its position (Pet. App. A-16), *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985), actually conflicts with that court's decision. Pet. 12-13. Even Northwestern appears grudgingly to admit that *Mantolete* is inconsistent with and does not support the Seventh Circuit's ruling. Northwestern initially flirts with the theory (Resp. 9-10) that somehow *Mantolete* applies only to the issue of reasonable accommodation, while ultimately conceding (Resp. 10), as it must, that the Ninth Circuit intended that the trial court weigh all of the evidence, without deference to either side's private physicians, in determining whether sufficient risk of future injury exists to justify exclusion, regardless of the availability of accommodation.[1]

The Seventh Circuit's decision also conflicts with the Eighth Circuit's opinion in *Wood v. Omaha School Dis-*

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[1] *Mantolete* remains the law of the Ninth Circuit as to a Section 504 (29 U.S.C. § 794(a)) claim. *See Mendez v. Gearan*, 1997 U.S. Dist. LEXIS 1594 at 20 n. 9 (N.D. Cal. February 13, 1997) (citing *Mantolete* in criticizing the new standard which the Seventh Circuit has created). Northwestern's assertion (Resp. 9-10) that *Mantolete* does not apply to a Section 504 claim is contradicted by the Seventh Circuit's reliance upon it, and by the decisions of other circuits. *See, e.g., Chiari v. City of League City*, 920 F.2d 311, 317 (5th Cir. 1991) (citing *Mantolete*, no difference between Section 501 and Section 504 standards as to issue of "otherwise qualified" except that Section 501 imposes an affirmative duty on federal employers to accommodate handicapped individuals).

trict, 25 F.3d 667 (8th Cir. 1994). There, the district court denied a claim by insulin-dependent diabetics that they were wrongfully excluded from the position of school bus driver. The parties each presented medical testimony concerning the risk of harm arising from the plaintiffs' disability. In affirming the district court's factual finding in favor of the employer that the risk to others was unacceptable, the Eighth Circuit stated (25 F.3d at 669):

> The evidence supports the finding that [plaintiffs] are poorly controlled diabetics and are thus in danger of problems from hypoglycemia or hyperglycemia. Although Dr. Duckworth's conclusions were contradicted by the testimony of Dr. Ratner, we cannot say that the district court clearly erred in crediting Dr. Duckworth's opinions over Dr. Ratner's contrary testimony.

Here, the district court credited Knapp's physicians' testimony over that of Northwestern's hired experts. If the Seventh Circuit had followed *Wood*, it would have affirmed the district court since the factual finding of no substantial risk was not clearly erroneous. Instead, the Seventh Circuit not only ignored *Wood*, but also the other circuit court and district court decisions which have ruled that the trial court should weigh the conflicting medical testimony on risk without deference to either side's private medical physicians. Pet. 12-16 and cases cited therein.[2]

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[2] At a minimum, *certiorari* is appropriate to address the issue of the level of deference a trial court is to give to the opinions of private physicians upon whom a grantee relies, a question which the Court did not answer in *School Board of Nassau County v. Arline*, 480 U.S. 273, 288 n. 18 (1987). Northwestern's assertion (Resp. 8 n.2) that the instant case does not implicate this issue is mistaken.

Doe v. New York University, 666 F.2d 761 (2d Cir. 1981) (Pet. 13; Resp. 10) also does not support the Seventh Circuit. In that case, the Second Circuit made clear that if the only issue barring plaintiff from admission to the defendant's medical school was fear of future injury to plaintiff or to others as a result of a prior mental disability, it was for the trial court to determine whether she was "qualified" by "weighing the expert testimony on each side." *Id.* at 779. The Second Circuit's decision in *Doe* conflicts with the Seventh Circuit's decision as the Seventh Circuit has barred the trial court from considering the conflicting expert testimony of the parties' respective private physicians and from making an independent finding of fact as to the severity of the risk of participation.

When an exclusion decision is based upon the fear of future injury, it is axiomatic that a grantee cannot have acted in good faith or reasonably unless it relied upon competent medical evidence of substantial risk. Improper motive or bad intent, which can be discovered through examination of the process by which an exclusion decision was made, may be relevant to showing either a failure to rely upon reasonable medical evidence or exclusion for reasons other than disability (*i.e.*, pretext). However, even Northwestern does not dispute that a grantee cannot rely upon its alleged good faith or lack of discriminatory intent as a defense to a Section 504 claim. *Alexander v. Choate*, 469 U.S. 287, 294-301 (1985); Pet. 10, 14 n.7.[3] The Seventh Circuit, however, neglected to

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[3] *See Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372 (10th Cir. 1981) (Whether grantee had rational basis for its decision is irrelevant to a Section 504 claim); *see also* Pet. App. F-3 to F-4.

consider *Choate* and has imposed a rule of law that allows a grantee to raise "the process" as a defense to such a claim, without regard to whether the disabled individual can actually meet a program's requirements.

Knapp does not seek preferential treatment. Instead, like other disabled persons, he seeks only the right Section 504 provides to him to live as normal life as possible and not to be deprived of that opportunity because a federal grantee that offers an activity incorrectly believes that there is a substantial risk he will injure himself if he participates.[4] *Certiorari* is called for here because limiting the trial court's inquiry to whether the grantee acted in good faith and without discriminatory intent conflicts with: 1) The explicit language of Section 504; 2) the Court's decisions in *Choate* and *Davis*, where the Court held that good faith and lack of bad intent are not defenses to a Section 504 claim, and that a disabled person who can perform an activity in spite of his alleged handicap is "qualified" under the Rehabilitation Act; and 3) the decisions of other circuit and district courts which have not deferred to the opinions of a federal grantee's private physicians in determining whether a future risk of injury is sufficient to support exclusion.

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[4] *See Mendez*, 1997 U.S. Dist. LEXIS 1594, at *20 n.9 ("if a decision-maker unnecessarily excludes an individual on the basis of a disability, that decision should be overturned, regardless of the sufficiency of the evidence upon which it was based").

II. THE TRIAL COURT'S ROLE IN ADDRESSING EXCLUSION DECISIONS BASED UPON FUTURE RISK OF INJURY DOES NOT PRESENT A "UNIQUE" QUESTION AND A DENIAL OF KNAPP'S PETITION WILL LEAVE CONFLICTING RULES OF LAW AS TO THE BASIS UPON WHICH *QUALIFIED* DISABLED PERSONS CAN STILL BE EXCLUDED FROM AN ACTIVITY.

Recognizing that the Seventh Circuit's opinion lacks precedential support and conflicts with all circuit court decisions and the overwhelming majority of district court decisions which have addressed the propriety of exclusion based upon risk of future injury, Northwestern seeks to avoid *certiorari* by isolating Knapp's case from those of other disabled persons. Northwestern contends this is an inappropriate case for review because it is "novel" and "unique"; it involves a "nonrecurring" issue; and that this "precise problem" will not recur "frequently." Resp. 6-7. Stated differently, the writ, according to Northwestern, should be denied because there probably will not be many lawsuits brought by disabled students with internal defibrillators who seek to play intercollegiate basketball.

Knapp's case, however, is not just about a student's right to play basketball; it is about the application of the Rehabilitation Act to the exclusion of persons due to risk of future injury based upon real or perceived disabilities. Knapp is no different than the plaintiff in *Arline*, who was banned from teaching because she had had tuberculosis; he is no different than the student who is prohibited from attending grammar school because he is HIV positive; he is no different than the person with AIDS who is denied medical treatment; he is no different than the insulin-dependent diabetic who seeks to become a

FBI agent or to drive a school bus; he is no different than the high school student with one kidney or one eye who is told by the school physician he cannot play football or wrestle. Pet. 12-16 and cases cited therein. Simply stated, claims under the Rehabilitation Act involving disabled persons who are excluded due to risk of future injury are very common, and are not "unique." Today, Northwestern tells Knapp that he "cannot do" because he had a cardiac episode in September 1994; tomorrow, an employer may deprive Knapp of a promotion because of a fear that stress will cause him to have a second event.

Northwestern tries to separate Knapp further from other disabled persons because Northwestern authorized its agent, a private "team physician," to make the exclusion decision.[5] Resp. 2-3, 6. This distinction falls flat since in almost all cases Knapp cites in his Petition, the federal grantee obtained medical evidence to support exclusion. The delegation of authority to a physician to decide or examine "future risk" should not immunize a

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[5] Northwestern's team physician is an orthopedic surgeon who was assisted by a university employed internist (who performed a perfunctory "school physical" of Knapp). Both are agents of the school. Neither physician has any cardiovascular expertise relevant to Knapp's condition and neither spoke with a cardiologist prior to the school's permanent exclusion of Knapp as an active member of its basketball program. Needless to say, Northwestern's assertion (Resp. 11) that "[t]he University would like nothing more than to have petitioner play basketball" is contradicted by its less than forthright conduct towards Knapp. Because the district court decided, with Northwestern's consent, that Knapp's request for permanent injunctive relief would only address his risk of participation going forward, and not the process by which Northwestern reached its exclusion decision, the parties never addressed the reasonableness of Northwestern's conduct at trial.

federal grantee from claims brought under the Rehabilitation Act. Yet, this is what the Seventh Circuit has improperly done by focusing the trial court's examination solely upon the "process" of exclusion. Regardless of *how* the decision is made, for a disabled person the result is still the same—the federal grantee has excluded that individual. The question presented is what rights under the Rehabilitation Act does the disabled person have to seek judicial relief from that decision.

Whether a disabled person can be barred from an activity because of fear of future injury has been and will continue to be addressed frequently. The conflict between the circuit courts as to the role of the trial court in deciding exclusion decisions of this type is appropriate for *certiorari* as the question is of importance to *all* disabled persons and is one that goes to the core of the Rehabilitation Act, which prohibits the exclusion of "otherwise qualified" disabled persons.

CONCLUSION

For all of the foregoing reasons, petitioner Nicholas Knapp respectfully requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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